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INTERVIEW

The Senator and the Constitution: An Interview With Orrin G. Hatch†

by RONALD K. L. COLLINS*
and DAVID M. SKOVER**

Introduction

It would be irresponsible to write a history of the Constitution in the twentieth century without noting the record of Utah's Republican Senator, Orrin G. Hatch. To those who have "followed Hatch's career," remarked federal judge Howard Markey, "he is Mr. Constitution in the Senate."¹ The fifty-five-year-old lawmaker "has been in the thick of virtually every constitutional battle waged during his [more than a] decade" in public office.² Regardless of how one views Hatch's legal, social and moral philosophy, it cannot be gainsaid that he has played a significant role in shaping the contours of modern constitutionalism.

That scholars have excluded Senator Hatch from their constitutional study is understandable, but troublesome. The omission is symptomatic of a larger problem: the contemporary academic obsession with judicial review. Today, constitutional thought is associated exclusively

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1. 104 F.R.D. 207, 232 (1985) (introducing Senator Hatch, speaking on federal judicial review).

2. Effron, *Hatch Soars After Rehnquist Victory*, LEGAL TIMES, Sept. 22, 1986, at 1, col. 1.

with courts. This "court-positivism"³ is objectionable for at least two reasons. First, it leaves a lacuna in the historical record by neglecting the impact of congressional action on the constitutional process. Second, it artificially confines analytical and doctrinal attention to only one of the three coequal constitutional actors.

For these reasons, and to encourage further work in this area,⁴ we chose to interview one of the foremost figures in legislative constitutionalism. We trust that the interview and the accompanying annotations will introduce readers to the Senator's views and provide them with a yardstick by which to measure the constitutional and political soundness of those views.

Background

Elected to the Senate in 1976, Hatch has chaired the influential Constitution Subcommittee of the Judiciary Committee and the powerful Labor and Human Resources Committee. He has also served as a member of the Budget Committee and the Select Committee on Intelligence, among others. In these capacities, he has been one of the leading political and intellectual forces aligned with American conservatism.

During his tenure as Chairman of the Constitution Subcommittee, Hatch was "exposed to more proposals . . . to amend the United States Constitution than any other member of Congress since James Madison was successful in securing ten amendments to that document."⁵ Indeed, a number of these proposed amendments were launched by the Senator. For example, he introduced at least three controversial resolutions: the Human Life Federalism Amendment,⁶ the Voluntary Silent Prayer Constitutional Amendment,⁷ and the Equal Protection Amendment, which would outlaw affirmative action measures.⁸ In addition, he was an origi-

3. Powell, Book Review, 80 Nw. U.L. REV. 1128, 1136 (1986).

4. See Collins & Skover, *The Future of Liberal Legal Scholarship*, 87 MICH. L. REV. 189, 212-16 (1988) (stressing the need for legislative scholarship).

5. 104 F.R.D. 207, 233 (1985) (statement by Hatch).

6. See *infra* notes 39, 41.

7. In relevant part, the proposed amendment provided:

Nothing in this Constitution shall be construed to prohibit individual or group silent prayer or reflection in public schools. Neither the United States nor any State shall require any person to participate in such prayer or reflection, nor shall they encourage any particular form of prayer or reflection.

First introduced in 1982 (as S.J. Res. 199), 128 CONG. REC. 10,371-72 (1982), the proposed amendment was reintroduced in 1985. See *Constitutional Amendment Relating to School Prayer: Hearings on S.J. Res. 2 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 3-4 (1985).

8. According to this proposed amendment (S.J. Res. 200),

nal co-sponsor of the Balanced Budget Amendment,⁹ the Line-Item Veto Amendment,¹⁰ and an amendment calling for the direct election of the President and Vice-President.¹¹

The former Utah lawyer also called for hearings on other proposed constitutional amendments, some of which he strongly opposed. During the ninety-eighth Congress, Hatch moderated the hearings on the impact of the Equal Rights Amendment.¹² In the wake of *Immigration and*

Neither the United States nor any State shall make or enforce any law which makes distinctions on account of race, color, or national origin

. . . [Or] establish or maintain, or require or permit any private individual or enterprise . . . to establish or maintain, goals, quotas, timetables, ratios, or numerical objectives which make distinctions on account of race, color, or national origin.

126 CONG. REC. 23,772-84 (1980).

In 1981, Senator Hatch argued that the Supreme Court's interpretations of the Civil Rights Act of 1964 amounted to "government-mandated discrimination . . . causing disruptions all over America in favor of the 'preferred' classes. Where in the Constitution do we find preferred classes?" AMERICAN ENTERPRISE INSTITUTE, WHOM DO JUDGES REPRESENT? 8 (June 1, 1981 conference); see Hatch, *Bork and Equal Protection*, Wash. Times, Oct. 2, 1987, at F1, col. 1 (describing affirmative action as "difficult to reconcile with the Constitution's language guaranteeing equal protection to every person").

9. In pertinent part, the proposed amendment provided:

Prior to each fiscal year, the Congress shall adopt a statement of receipts and outlays for that year in which total outlays are not greater than total receipts. The Congress may amend such statement provided revised outlays are not greater than revised receipts. Whenever three-fifths of the whole number of both Houses shall deem it necessary, Congress in such statement may provide for a specific excess of outlays over receipts by a vote directed solely to that subject. The Congress and the President shall ensure, pursuant to legislation or through exercise of their powers under the first and second articles, that actual outlays do not exceed the outlays set forth in such statement.

Balanced Budget Constitutional Amendment: Hearings on S.J. Res. 13 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. 3-5 (1985); see also *infra* note 79.

10. This proposed amendment provided:

The President may disapprove any item of appropriation in any Act or joint resolution, except any item of appropriation for the legislative branch or the judicial branch of the Government. If an Act or joint resolution is approved by the President, any item of appropriation contained therein which is not disapproved shall become law. The President shall return with his objections any item of appropriation disapproved to the House in which the Act or joint resolution containing such item originated. The Congress may, in the manner prescribed under section 7 of article I for Acts disapproved by the President, reconsider any item of appropriation disapproved under this article.

Line-Item Veto: Hearings on S.J. Res. 178 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 99th Cong., 2d Sess. 7-8 (1984).

11. This amendment would abolish the office of elector of the President and Vice-President of the United States and authorize their direct election by the "people of the several States" and the District of Columbia. The full text of the proposed amendment is contained in *The Electoral College and Direct Election: Hearings on S.J. Res. 18 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 21-25 (1977).

12. See *The Impact of the Equal Rights Amendment: Hearings on S.J. Res. 10 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 98th Cong., 1st & 2d Sess. (1983-84) (Pts 1 & 2). For Senator Hatch's views on the matter, see O. HATCH, THE

Naturalization Service v. Chadha,¹³ he presided over hearings concerning a constitutional amendment to restore the legislative veto.¹⁴ Apart from any proposed constitutional amendments, the one-time bishop of the Church of Jesus Christ of Latter-Day Saints directed hearings on religious liberty¹⁵ and "fetal pain."¹⁶

On the statutory front, Hatch has championed the conservative cause by attempting to shape constitutional principles and policy. Consistent with his proposed amendments, he spearheaded a campaign to establish procedures for a future constitutional convention.¹⁷ Hatch's efforts to "reform" civil rights and civil liberties laws were legion, though largely unsuccessful. He introduced or cosponsored an anti-busing bill,¹⁸ an amendment to federal voting rights law requiring plaintiffs to prove intentional discrimination,¹⁹ an act to limit municipal liability for civil rights violations,²⁰ an anti-abortion funding measure,²¹ a bail reform act,²² a pro-death penalty law,²³ an anti-exclusionary rule measure,²⁴ an

EQUAL RIGHTS AMENDMENT: MYTHS AND REALITIES (1983) [hereinafter MYTHS]; Hatch, *The Equal Rights Amendment Extension: A Critical Analysis*, 2 HARV. J. L. & PUB. POL'Y 19 (1979).

13. 462 U.S. 919 (1983).

14. See *Constitutional Amendment to Restore Legislative Veto: Hearings on S.J. Res. 135 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. (1984).

15. See *Issues in Religious Liberty: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. (1984).

16. See *Fetal Pain: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. (1985).

17. See S. 1710, 96th Cong., 1st Sess., 125 CONG. REC. 22,945-50 (1979); S. 817, 97th Cong., 1st Sess., 127 CONG. REC. 5505 (1981); 129 CONG. REC. 764-70 (1983); S. 40, 99th Cong., 1st Sess., 131 CONG. REC. 107 (1985); see also Cohodas, *Constitutional Convention Procedures Bill Snagged in Senate Judiciary Panel*, 39 CONG. Q. 2449 (1981) (Hatch describes main principle of his repeated bills as ensuring that Congress could only call convention and would not be "in a position to undermine the convention process."); Hatch, Foreword, *The Amendment Process & Limited Constitutional Conventions*, 2 BENCHMARK 63 (1986).

18. See, e.g., *The 14th Amendment and School Busing: Hearings on S. 1760 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 398-404 (1981) (withdrawing inferior federal court jurisdiction to order racial assignment or busing); 61 Cong. Dig. 150-56 (1982).

19. For a comprehensive statement of the Senator's views on the matter, see 128 CONG. REC. 13,110-64 (1982).

20. See S. 436, 99th Cong., 1st Sess., 131 CONG. REC. 2171-75 (1985) (providing a "special defense to the liability of political subdivisions of States").

21. See *Abortion Funding Restriction Act: Hearings on S. 522 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 4 (1985) (amending Civil Rights Act of 1964 to prohibit use of federal funds for abortions).

22. See, e.g., 18 U.S.C. § 3142 (Supp. III 1982 & Supp. IV 1986) ("Bail Reform Act of 1984") (requiring courts to detain, prior to trial, arrestees charged with certain felonies if the government can show evidence that release conditions are dangerous), upheld in *United States*

anti-polygraph bill,²⁵ a congressional reapportionment proposal,²⁶ and a firearm owners' protection act,²⁷ among others. Assuming an adversarial posture, he piloted a successful attack on liberal amendments to the 1968 Fair Housing Act.²⁸

In matters concerning the federal judiciary, Orrin Hatch has earned a reputation as a formidable player. From the Reagan administration's perspective, his advocacy proved helpful in the Sandra Day O'Connor²⁹ and Antonin Scalia³⁰ nomination proceedings, crucial in the William Rehnquist³¹ and Daniel Manion³² hearings, and valiant in the Robert Bork³³ confirmation battle.³⁴ In addition to defending these and other Reagan judicial nominees, he has argued against the rejection of nominees on the basis of political, judicial and economic philosophies.³⁵

v. Salerno, 107 S. Ct. 2095 (1987); see also S. REP. NO. 147, 98th Cong., 1st Sess. (1983) ("Bail Reform Act of 1983").

23. See, e.g., S. REP. NO. 143, 97th Cong., 1st Sess. (1981) (report accompanying S. 114, which proposed procedures for imposition of death sentence for certain federal crimes); see also 103 CONG. REC. 2209-11 (1984) (remarks of Senator Hatch in support of S. 1765, a modified version of S. 114).

24. See *infra* note 55.

25. See S. 1815, 99th Cong., 1st Sess., 131 CONG. REC. 30, 054 (1985).

26. See 131 CONG. REC. 30,311 (1985) (S. 1734, adjusting population count to exclude illegal aliens).

27. See S. 49, 99th Cong., 1st Sess., 131 CONG. REC. 16,984 (1985).

28. See Tolchin, *Conservative Republican Senators Filibuster on Housing Bias Measure*, N.Y. Times, Dec. 2, 1980, at B17, col. 5; Tolchin, *Bill to Strengthen Fair Housing Act Killed as Senate Cloture Vote Fails*, N.Y. Times, Dec. 10, 1980, at B8, col. 3.

29. See *Nomination of Sandra Day O'Connor: Hearings Before the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. (1981).

30. See *Nomination of Antonin Scalia: Hearings Before the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. (1986).

31. See *Nomination of William Rehnquist: Hearings Before the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. (1986); see also Greenhouse, *Senators Hear Familiar Speeches As the Debate on Rehnquist Opens*, N.Y. Times, Sept. 12, 1986, at 10, col. 1; Effron, *Hatch Soars After Rehnquist Victory*, *supra* note 2.

32. See *Nomination of Daniel Manion: Hearings Before the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. (1986).

33. See *Nomination of Robert Bork: Hearings Before the Senate Comm. on the Judiciary*, 100th Cong., 1st Sess. (1987); see also Hatch, *Bork and Equal Protection*, *supra* note 8, at F1, col. 1.

34. Hatch was also Edwin Meese's "chief defender during Meese's . . . tumultuous confirmation experience in 1985." Effron, *supra* note 2, at 8, col. 4.

35. See Hatch, Book Review, 99 HARV. L. REV. 1347, 1350, 1353 (1986) (reviewing L. TRIBE, *GOD SAVE THIS HONORABLE COURT* (1985)) (opposing "ideological inquisitions by the Senate" and advancing "considerations militating against using political criteria in the confirmation process"); see also AMERICAN ENTERPRISE INSTITUTE, *supra* note 8, at 24; cf. H. SCHWARZ, *PACKING THE COURTS* 83-89, 201-204 (1988) (seventeen "judicial philosophy" questions prepared by Senators Hatch, Denton and East and submitted to Joseph H. Rodriguez, nominee for the U.S. District Court). Judiciary Committee Chairman Senator Strom Thurmond challenged his colleagues' inquiries. Ultimately, Senator Hatch voted to confirm

Hatch's standing as a stalwart conservative constitutionalist was such that by 1986 his name had surfaced on President Reagan's "short list" of possible Supreme Court nominees.³⁶ Were it not for the *Washington Post's* story on the "emoluments" issue,³⁷ the Senate may have assessed the qualifications of one of its own for the post left open in 1987 by the retirement of Justice Lewis Powell.³⁸

The interview that follows was held on Friday, December 19, 1986, in Senator Hatch's office in Washington, D.C. Then Minority Staff Director of the Senate Judiciary Subcommittee on the Constitution, Mr. Randall Rader, now a federal judge, was also present. But for scheduling the interview, we had no prior contact with Senator Hatch or any member of his staff.

The interview was tape-recorded and transcribed. Minor stylistic changes were made to suit the interview to a written format. In addition, we annotated the interview to explain, expand or qualify the positions articulated by the Senator. The footnotes are drawn from the Senator's published and unpublished statements made prior and subsequent to the interview. In all that we have done, we have attempted to be as objective as possible—this, even though our personal viewpoints often differ from the Senator's.

We offer this interview as an impressionistic portrait of Orrin Hatch's constitutional profile.

Abortion and the Constitution

QUESTION: Do you believe that fetuses should be recognized as legal persons within the meaning of the Fifth and Fourteenth Amendments to the United States Constitution?

HATCH: No.³⁹ For over 150 years, the states were free to regulate

Rodriguez, even though earlier he had voted against Court of Appeals nominees Patricia Wald and Abner Mikva. *Id.* at 54.

36. See Brandt, *Reagan May Turn To Sen. Hatch as Next Supreme Court Nominee*, Wash. Times, Nov. 20, 1986, at F4, col. 5; Effron, *supra* note 2, at 8, col. 1; *Justice Hatch?*, NEWSWEEK, Sept. 22, 1986, at 10. During the 1988 presidential election, Hatch remained an outspoken critic of liberal values. See, e.g., *Hatch Hits Democrats, Denies It*, Wash. Post, Sept. 2, 1988, at A4, col. 6.

37. Kamen, *Could Judges' Pay Raise Keep Hatch Off Court?*, Wash. Post, June 5, 1987, at A25, col. 1 (U.S. CONST. art. I, § 6, cl. 2 in effect prohibits Senator from serving as judicial officer if salary for the position has been increased during the Senator's term); see also Matheson, Jr., *Hatch Downed*, NAT'L L. J., July 13, 1987, at 13.

38. Of course, after the 1988 Senatorial election, the "emoluments" barrier was lifted, until any further Supreme Court pay raises.

39. In his critique of *Roe v. Wade*, 410 U.S. 113 (1973), Senator Hatch argued:

The Court's holding that the Fourteenth Amendment could not possibly have been intended to protect the unborn may conflict with the plain meaning of the word

abortion and other domestic policies. They were free to permit or punish

"person," and quite possibly, with the intent of the Fourteenth Amendment. In order to decide whether an individual is protected under the Fourteenth Amendment, Congressman John Bingham of Ohio, its principal Framer, declared in 1867, "the only question to be asked of the creature claiming its protection is this: Is he a man?" The Court's observations notwithstanding, this question has consistently been answered in the affirmative by American courts and legislatures with regard to the unborn.

128 CONG. REC., 23,537-41 (1982); see also *id.* at 23,545 n. 39, (quoting Gorby, *The Right to an Abortion, the Scope of Fourteenth Amendment 'Personhood,' and the Supreme Court's Birth Requirement*, 1979 S. ILL. U.L.J. 1, 24 ("There is nothing in the function of the fourteenth amendment to suggest that its scope or purpose is to protect only the born.")).

As early as 1977 and as late as 1981, Senator Hatch introduced and supported constitutional amendments consistent with the view that fetuses should be recognized as persons within the protection of the supreme law. See, e.g., 123 CONG. REC. 31,438 (1977) (introduction of S.J. Res. 84, human life amendment); 127 CONG. REC. 848-84 (1981) (supporting S.J. Res. 17, Senator Garn's human life amendment).

The Senator's critique of *Roe*, quoted above, accompanied a statement in support of the proposed Human Life Federalism Amendment, S.J. Res. 110, 97th Cong., 1st Sess., 127 CONG. REC. 1381 (1981), which "would overturn *Roe*" and "establish concurrent authority to legislate in the State and Federal Governments on the subject of abortion." 128 CONG. REC. 23,533 (1982). Then Senate Judiciary Committee member John P. East (R-NC) took exception to the Hatch constitutional amendment because it "does not address the fundamental problem of the right to life of the unborn and whether they should be protected under the 14th Amendment." Still other anti-abortion activists argued the Hatch amendment doesn't go far enough. See Miller, *Two Competing 'Pro-Life' Measures Split the Anti-Abortion Lobby*, NAT'L J., Mar. 20, 1982, at 511, 512; see also *Anti-Abortion Groups Repudiate Hatch Plan*, N.Y. Times, Sept. 24, 1981, at 14, col. 1 (72 anti-abortion groups repudiating Hatch Human Life Federalism Amendment and calling on President Reagan to propose amendment defining fetuses as persons).

In response to criticisms of his Human Life Federalism Amendment, Senator Hatch stated:

Let me be clear about what I am saying. I personally believe that abortion is an all or nothing issue. I am irreconcilably opposed to abortion. I believe that abortion involves the taking of a human life. It is morally, ethically, and I believe constitutionally wrong. Should this amendment become part of the Constitution, I would be among those seeking the most restricted State laws with respect to abortion. When a greater consensus exists in this country on the repugnance of abortion—which consensus I believe will be promoted by this amendment—I will be among those seeking a direct constitutional prohibition on abortion.

129 CONG. REC. 674 (1983) (introducing S.J. Res. 3); accord 129 CONG. REC. S9082 (daily ed. June 27, 1983).

According to a congressional aide, Senator Hatch declined to add his name to the list of some 110 members of Congress who signed one of two anti-abortion amicus briefs in *Webster v. Reproductive Health Serv.*, 851 F.2d 1071 (8th Cir. 1988), *prob. juris. noted*, 109 S. Ct. 780 (1989) (No. 88-605), because he did not have adequate time to review them and because he typically does not sign amicus briefs. Telephone interview with Mark Dissler (Mar. 14, 1989). One of these briefs, offered by Professor Albert Blaustein, argues that fetuses should be recognized as "persons" under the Fourteenth Amendment. The other, filed by Professor Jules Gerard, contends that the regulation of abortion should be returned to federal and state lawmakers.

In July, 1985, Senator Hatch did, however, sign the amicus brief prepared by Professor Robert Destrow on behalf of Senator Gordon Humphrey (R-NH) and 81 other members of Congress. The anti-abortion brief, submitted in *Thornburgh v. Am. College of Obstetricians*,

abortion. Then, in 1973, in *Roe v. Wade*,⁴⁰ [the Court changed that]. I believe the case was incorrectly decided. Be that as it may, the Supreme Court created a national right to abortion. I think it would also be incorrect to conclude that 150 years of history were erroneous, and the states did not have authority over that time to regulate abortions because the fetus was in fact protected by the Due Process Clause. The constitutional amendment that I proposed would have overturned *Roe*; it would have permitted the people in the states to govern themselves democratically on these issues.⁴¹ The states would have been free, as they were prior to 1973, to regulate or refrain from regulating abortion.⁴²

QUESTION: On that note, assume hypothetically that *Roe v. Wade* were overruled, and thereafter a dozen or more states reinstated its holding as a matter of their own state law. What, if any, national restrictions should and/or could be imposed on such states in order to safeguard fetal life?

HATCH: Congress' powers would not be altered by the reversal of *Roe v. Wade*. It would still have authority under the Commerce Clause, for instance, and might choose to regulate the interstate commerce ship-

476 U.S. 747 (1986). argued, among other things, that for constitutional purposes "under some circumstances . . . the unborn have some type of 'personhood' status." Brief amicus curiae of U.S. Sen. Gordon J. Humphrey (R-N.H.), U.S. Sen. Orrin G. Hatch (R-Utah), U.S. Rep. Christopher H. Smith (R-N.J.), U.S. Rep. Alan B. Mullohan (D-W.Va.), and certain other members of the Congress of the United States in support of Appellants at 24, *Thornburgh v. Am. College of Obstetricians*, 476 U.S. 747 (1986) (No. 84-495).

40. 410 U.S. 113 (1973).

41. Between 1981 and 1987, Senator Hatch repeatedly introduced a constitutional amendment that provided:

A right to abortion is not secured by this Constitution. The Congress and the several States shall have the concurrent power to restrict and prohibit abortions: *Provided*, That a law of a State which is more restrictive than a law of Congress shall govern.

See 127 CONG. REC. 21,381 (1981) (S.J. Res. 110); 129 CONG. REC. 671 (1983) (S.J. Res. 3); 131 CONG. REC. 294 (1985) (S.J. Res. 5); 137 CONG. REC. S1270 (daily ed. Jan. 28, 1987) (S.J. Res. 36).

42. See, e.g., 129 CONG. REC. S9088 (daily ed. June 27, 1983) (emphasizing the states' "plenary authority" over abortion regulation); 129 CONG. REC. S9281 (daily ed. June 28, 1983) ("[S]tates would be free to deal with abortion policy as they see fit. Abortion would be among the many subjects not specifically delegated to the Federal Government by the Constitution and thus left to the States and the people themselves.").

Though stressing the states' rights component of his Human Life Federalism Amendment, Senator Hatch also acknowledged that "[C]ongress would be empowered to establish minimum national standards with respect to abortion, if it chose." 129 CONG. REC. 675 (1983) (introducing S.J. Res. 3). Several months later, the Senator, again commenting on S.J. Res. 3, added: "It would not grant Congress any power to directly restrict or prohibit abortion. Congress would retain its authority under its enumerated constitutional powers to regulate interstate commerce and other areas that might tangentially touch upon abortion." 129 CONG. REC. S9083 (daily ed. June 27, 1983); *accord id.* at S9122; see *infra* note 43.

ment of abortifacients.⁴³ In fact, a statute⁴⁴ to that effect, unenforceable under *Roe*, is currently on the books. Congress could also deny the use of federal funds to provide abortion services, as has been accomplished by the Hyde Amendment,⁴⁵ and as it now does with regard to most federal health programs.⁴⁶

QUESTION: Assume that *Roe* were overruled, that twenty states provided substantial numbers of abortions, and that people from other states traveled interstate to obtain abortions. As a matter of public policy, Senator, would you favor, say, economic or other congressional restraints on those states?

HATCH: I have always supported the Hyde Amendment, and that surely is a form of economic restraint. I think that, no matter how you cut it, abortion—indiscriminate abortion, or abortion on demand—is a very detrimental thing to society as a whole. I would prefer to limit abortion. We found in our hearings⁴⁷ from pro-abortion statistics that—of approximately one million-and-a-half to two million abortions a year, only three percent—really only one-and-a-half percent, let's double it to 3 per-cent—are required to save the life of a mother, for rape, incest, or serious deformity. That means that ninety-seven percent of all abortions are basically for reasons of convenience.

QUESTION: If we understand you correctly, if *Roe* were overruled and some states began to provide large numbers of abortions, as a matter

43. In an exchange with Senator Robert Packwood (R-OR), Senator Hatch recognized the broad scope of Congress' "residual" powers to regulate abortion through the Commerce Clause: "The Federal Government . . . has utilized the commerce power to justify any Federal law it wants to create. . . . There is no doubt in my mind that under the commerce power, Congress could hypothetically preempt almost all regulatory powers left to the States." 129 CONG. REC. S9123 (daily ed. June 27, 1983) (commenting on S.J. Res. 3); see also *supra* note 42.

44. See 15 U.S.C. §§ 1461, 1462 (1982 & Supp. IV 1986).

45. The first Hyde Amendment, which was upheld in *Harris v. McRae*, 448 U.S. 297 (1980), was set out in Pub. L. No. 94-439, § 3209, 90 Stat. 1418, 1434 (1976).

"Could Congress use its authority to dispense money, the spending clause, to require publicly funded medical schools to ban abortion, to require publicly funded hospitals to ban abortions except for the life of the mother, to require any State receiving welfare funds to ban abortion?" In response to this question, Senator Hatch noted: "Congress has enjoyed broad spending authority. Based on . . . current case law, I would expect that a congressional spending limitation intended to ban abortions could be upheld by the Supreme Court." 129 CONG. REC. S9283 (daily ed. June 28, 1983) (commenting on the potential effects of the Human Life Federalism Amendment).

46. Apart from the hypothetical, at this point in the interview, Senator Hatch added: "But, it would not be within the Congress' power to outlaw abortion *per se* because of the *Roe* decision."

47. See generally *Constitutional Amendments Relating to Abortion: Hearings on S.J. Res. 17, S.J. Res. 18, S.J. Res. 19, and S.J. Res. 110 Before the Subcomm. on the Constitution of the Comm. on the Judiciary*, 97th Cong., 1st Sess. (1981).

of policy you would not oppose having Congress place certain economic and other restraints on the states. Is that correct?

HATCH: I would have to look at the proposal, but I would prefer a constitutional amendment. I have always preferred that. Some of my colleagues would like to exercise Congress' right to withhold jurisdiction under Article III. I think under certain circumstances that article could be utilized, but I think that option is very unwise and unwarranted, except in the most stringent of circumstances where basic fundamental liberties are involved.⁴⁸ Some would say that the fetus' right to life is such a basic fundamental liberty.

QUESTION: In July of 1981, you voted in subcommittee for Senate Bill 158 (Senator Helms' human life statute). Thereafter, you expressed serious constitutional reservations about that statute.⁴⁹ Would you elaborate on the nature of your reservations?

HATCH: The Human Life Bill would have declared that the word "person" in the Due Process Clause [includes] "fetuses." In other words, Congress would have, by mere statute, changed the words of the Constitution—in effect, including the words "and fetuses" after "persons" in the Due Process Clause.

I believe the Constitution can only be changed by the procedures enumerated in Article V, and I know that the proponents of the bill, and even the Supreme Court in *Katzenbach v. Morgan*,⁵⁰ suggested that Section Five of the Fourteenth Amendment gave Congress additional power with respect to defining rights. Section Five says that Congress is empowered to enforce the amendment. The power to enforce is not the power to define the substantive content of the guarantees. In that sense, I disagree with the Human Life Bill and the *Katzenbach* decision.⁵¹ (And,

48. See *infra* notes 60-67 and accompanying text.

49. See Cohodas, *Anti-Abortion Bill Advances in Senate Panel*, CONG. Q., July 11, 1981, at 1253.

50. 384 U.S. 641 (1966).

51. On an earlier occasion, Senator Hatch explained in his interpretation of *Katzenbach v. Morgan* his view on Congress' authority to enforce, independent of judicial construction, the dictates of the Fourteenth Amendment:

In *Katzenbach*, the Court made clear that [Sec. 5 of the Fourteenth Amendment] does not merely give Congress the authority to *enforce* those rights which are already understood to exist in the basic provisions of the Fourteenth Amendment, but gives the authority to *define* those rights as well. In light of the vagueness of the Fourteenth Amendment, this gives Congress the expansive authority to define "due process" or "equal protection" and obligate the States to abide by these definitions.

Referring to the proposed Equal Rights Amendment, Senator Hatch thereafter added by way of analogy:

The same would be true about the "enforcement" clause of the ERA. Congress would not be limited to "enforcing" rights against the States that had already been established by the courts, but would be able to define, *in the first place*, such rights

I would note that I was joined in that opinion by a pretty eminent group of agreeable people—Robert Bork, William Van Alstyne, Laurence Tribe, Archibald Cox, and others. Sometimes it is a little uncomfortable being in that august a group.)

But I voted for the Human Life Bill in the subcommittee because I felt that the entire Senate should decide this important constitutional issue, and declare, once and for all, that Congress was not empowered to change by statute the meaning of the Constitution, and that the only acceptable way of changing the meaning of the Constitution would be by an Article V procedure.

Congressional Authority to Enforce the Fourteenth Amendment

QUESTION: Senator, do you believe that the *Miranda* provision of Title II of the Omnibus Crime Control and Safe Streets Act of 1968⁵² is constitutional?

HATCH: In 1968, shortly after *Miranda* imposed strict warning requirements on police officers to ensure that pretrial statements were in fact truly voluntary, the Congress (some would say in a fit of pique) enacted an alternative set of procedures that conflict with the Supreme Court dictum. Although these procedures remain on the books, the Justice Department has never tried to use them, as far as I know.⁵³ Instead, it has chosen to comply with the more rigorous *Miranda* procedures. This, in my opinion, was a wise decision by the Justice Department to avoid any particular interbranch conflict. I do not differ with that. If, as I suspect, your question really goes to whether the Congress has to abide by the constitutional interpretations of the Supreme Court, I would have to say yes.

QUESTION: If you were in the Senate in 1968, would you have voted for this bill?

and require State laws to be consistent. Congress could effectively nullify provisions of the Constitution which confer primary power upon the States.

O. Hatch, MYTHS, *supra* note 12, at 28 (1983) (emphasis in original).

52. 18 U.S.C. § 3501(a)(1968). This section purports to "repeal," at least in federal prosecutions, the rule of *Miranda v. Arizona*, 384 U.S. 436 (1966), by providing that a confession "shall be admissible in evidence if it is voluntarily given"; see Y. KAMISAR, W. LAFAYE & J. ISRAEL, *MODERN CRIMINAL PROCEDURES* 572-74 (6th ed. 1986).

53. Cf. *United States v. Crocker*, 510 F.2d 1129 (10th Cir. 1975). Subsequent to this interview, the Office of Legal Policy of the U.S. Department of Justice issued a report, prepared by Stephen Markman (a former Judiciary Committee top aide to Hatch), recommending that "the Department of Justice should seek to persuade the Supreme Court to abrogate or overrule the decision in *Miranda*. The most promising line of attack involves reliance on the statute enacted in 1968 to achieve that end. 18 U.S.C. § 3501." Y. KAMISAR, W. LAFAYE & J. ISRAEL, *supra* note 52, at 110 (6th ed. Supp. 1988).

HATCH: Congress may not, by a majority vote, decide to change the meaning of the Constitution. That would violate Article V, which says that the Constitution can only be changed in accordance with its set procedures or by amendment. As I have already mentioned, I believe the abortion case was wrongly decided, and that the orderly way to proceed to change that ruling is to propose, pass, and ratify a constitutional amendment, which, of course, I tried to do.⁵⁴ This is the only way, it seems to me, to avoid immeasurable chaos and confrontation in our system of government.

I add, however, that you must carefully read some Supreme Court decisions to discern whether or not they are based on the Constitution or whether they invite congressional solution.⁵⁵ Some cases do. *Grove*

54. In early spring of 1981, Senator Hatch supported S. 158, a statute proposed by Senator John P. East (R-NC), which declared that human life "shall be deemed to exist from conception." When asked by a New York Times reporter, "Do you think that a Congressional statute is the proper approach to this issue?" Hatch replied:

Well, I continue to prefer a constitutional amendment to deal with the *Roe v. Wade* decision. I am not yet entirely comfortable with S. 158, the statutory approach, but I do believe that a credible case can be made for it. . . . Section 5 of the 14th Amendment . . . gives Congress the power to enforce by appropriate legislation the provisions of the 14th Amendment. S. 158 would make the Congressional finding that human life shall be deemed to exist from the point of conception, without regard to race, age, health, defect or condition of dependency. It would make the further finding that "a person," for purposes of the due process guarantees of the 14th Amendment, would include all human life.

As Congressmen Take Up the Abortion Issue, Two Sides Debate: When Does Life Begin? N.Y. Times, April 19, 1981, § 4, at 16, col. 1.

Later in the same year, however, Senator Hatch withdrew his support for such statutory measures, specifically rejecting S. 158 in favor his proposed constitutional amendment, S.J. Res. 110, *supra* note 41. Apparently, he opposed S. 158 on two grounds: he doubted its constitutionality and its chances for political success. See Cohodas, *Constitutional Amendment To Permit Ban on Abortion Approved by Senate Panel*, CONG. Q., Dec. 19, 1981, at 2526; Roberts, *Catholic Bishops For Amendment Allowing States to Ban Abortions*, N. Y. Times, Nov. 6, 1981, at A1, col. 2; accord 129 CONG. REC. 674 (1983) (Hatch remarks reintroducing Human Life Federalism Amendment (S. 498), noting lack of political consensus on constitutional recognition of a fetus as a person).

55. Early in 1983, Senator Hatch introduced S. 283, a bill that would have eliminated and established an alternative to the exclusionary rule in federal criminal proceedings. Speaking (for himself and Senators Thurmond and DeConcini) in favor of the measure, Senator Hatch declared:

Mr. President, today I am introducing a bill to eliminate and establish an alternative to the exclusionary rule in federal criminal proceedings. The exclusionary rule is a judicial policy mandating the inadmissibility of evidence obtained in violation of certain fourth amendment rights. . . .

Although the fourth amendment triggers its judicial application, the exclusionary rule is not a part of the Constitution, but a court-made rule of evidence that was not adopted for Federal courts until 1914 . . . [citing Rader, *Legislating a Remedy for the Fourth Amendment*, 23 S. TEX. L. J. 585 (1982).]

. . . [T]he exclusionary rule instead is custom made to deter the prosecutor, not those law enforcement officers guilty of committing the illegal acts. . . . The rule's adamant demand for a perfect trial is without constitutional foundation. In criminal

*City*⁵⁶ is a perfect illustration. There, the Court basically said, "you can change." We've tried to do that in subsequent Congresses.⁵⁷

The *Miranda* case, I believe, suggests that other alternatives may protect voluntariness as well. Consequently, I would want to study the legal merits a little more closely before deciding conclusively whether *Miranda* was grounded in the Constitution in a manner that forecloses Congressional action by statute.

prosecutions, the sixth amendment maintains that the accused be given a speedy and public trial, not necessarily a perfect trial. . . .

. . . In recent Supreme Court decisions concerning the exclusionary rule, Justices have continued to echo the fact, which was first introduced in *Wolf v. Colorado*, 338 U.S. 25 (1949), that the rule is "judicially created and one which Congress might negate." The bill I propose today is in response both to the cries of these Justices of the Supreme Court and to our fellow Americans, who are increasingly becoming victims of violent criminal acts.

My bill, comprised of two major provisions, would eliminate the exclusionary rule, thus permitting evidence not [to] be held inadmissible, when obtained in violation of fourth amendment rights by Federal law enforcement officials, in a Federal criminal trial. Also, my bill would allow for redress for innocent persons of fourth amendment violations. Federal law enforcement officials who violate fourth amendment rights will not be afforded protection by this bill; but they will instead [b[e] required to answer for their actions [in civil tort suits]. Both provisions are needed.

129 CONG. REC. 1119-21 (1983); see also 130 CONG. REC. 2099-2101 (1984) (proposed alternative to federal exclusionary rule); 131 CONG. REC. 90-93 (1985) (same). None of these measures was adopted.

56. *Grove City College v. Bell*, 465 U.S. 555 (1984) (federal anti-discrimination laws governing educational institutions apply only to specific program or department receiving federal funds).

57. After this interview, Congress overrode President Reagan's veto of a bill which expands the reach of federal civil rights laws to override the effects of the restrictive *Grove City* ruling. Senator Hatch opposed the override. See Molotsky, *House and Senate Vote to Override Reagan on Rights*, N.Y. Times., Mar. 23, 1988, at A1, col. 6.

Prior to this, Senator Hatch opposed congressional attempts to reverse the *Grove City* decision. See Cohen, *Who Controls the Senate?* NAT'L J., 552 (1985); Blinken, *Down the Hatch*, NEW REPUBLIC, Nov. 26, 1984, at 14.

For statements of Senator Hatch's views on the *Grove City* controversy, see Hatch, *The Myths and Realities of the Proposed Civil Rights Act*, 9 HARV. J. L. & PUB. POL'Y 1, 5-6 (1986) ("What is most wrong with [the proposed Civil Rights Act of 1984 or 1985] is that it would incorporate a dangerous notion of discrimination into the law of our nation. . . . What it ultimately represents is the institutionalization of federal affirmative action policy."); 64 CONG. DIG. 13 (1985); 135 CONG. REC. 2448 (1985); 130 CONG. REC. S12,514-19 (daily ed. Oct. 1, 1984) (50 questions submitted by Sen. Hatch concerning proposed *Grove City* legislation); 130 CONG. REC. S12,174-75 (daily ed. Sept. 27, 1984) ("I do not really believe it is a civil rights issue. I believe it is an issue of governmental power: the Federal Government, vis-a-vis State and local governments, as well as private industry and nonprofit corporations."); 130 CONG. REC. S12,152, 12,153 (daily ed. Sept. 27, 1984) ("The issues involved are monumental issues. Not only civil rights, which I think most everybody in the Senate would want to advance, but the issues of separation of powers, federalism, and governmental power and authority."); 130 CONG. REC. S12,145-57 (daily ed. Sept. 27, 1984); 130 CONG. REC. S9853, 9854 (daily ed. Aug. 7, 1984) (proposing an act to reverse *Grove City*, characterized as "far more narrow" than alternative proposals).

QUESTION: Are you saying that you may not have voted for the Omnibus Crime Control Act?

HATCH: That's right. I might *not* have. If I thought that the measure was an attempt by the legislature to change a constitutional ruling by a majority vote, when Article V provides for the amendment process as the only effective means of making a constitutional change, that would have great influence on my vote.⁵⁸

Legislative Review of Constitutional Questions

QUESTION: Would you endorse a variation on the original proposal for a Council of Revision if it were composed of legislators only and if its powers were limited to reviewing proposed federal legislation? What we are interested in is whether Congress currently has adequate procedures to review proposed legislation for constitutional deficiencies before passage.

HATCH: I would say no. I do not think we need a supercommittee to assess the constitutionality of legislation. I disagree with Mr. Madison [who supported Edmund Randolph's proposal], and I think his colleagues disagreed with him at the time. Every member is bound by his oath and duty to assess every piece of legislation for constitutionality. It is the duty, then, of the judiciary, it seems to me, to perform this constitutional review function. By and large, although I disagree from time to time, I think the judiciary has done an incredible job.⁵⁹

58. Senator Hatch has indicated, however, that section five of the Fourteenth Amendment grants authority to Congress to restrict the jurisdiction of the inferior federal courts and might be used to override errant Supreme Court constitutional interpretations. For example, in the context of public school busing, he noted:

My legislation [S. 37, public school busing] is also based on section 5 of the 14th amendment. . . .

[This section places] Congress in a leading role in the selection of remedies for violations of the 14th amendment. Therefore, it is entirely proper for Congress to determine that assignment of students to public schools on the basis of race is not an appropriate or effective remedy for unconstitutional segregation. The manner in which Congress would choose under this bill to limit this counterproductive remedy, if indeed this could be called a remedy at all, is to withdraw the jurisdiction of lower Federal courts to issue orders that would assign students to schools on the basis of race.

131 CONG. REC. 101, 103 (1985).

59. Speaking at a 1981 conference sponsored by the American Enterprise Institute, Senator Hatch defined "judicial activism":

[It is] the tendency of courts . . . to solve problems rather than to resolve grievances, a tendency to use plaintiffs as vehicles for imposing far reaching orders applying to classes of individuals, a tendency to impose broad affirmative action obligations upon society, a tendency to loosen jurisdictional requisites so that they can grant more standing in particular suits, and of course, the tendency to impose the judicial branch

Moreover, I think [your proposal] might have been a constitutional flaw, too, had it been put into effect. I say this because it would give a few members from a few states a veto power over the will of the entire Congress with respect to constitutional interpretation. I think that result would be disastrous, especially to the smaller states. Now, Article V provides that no state may be "deprived of its equal Suffrage in the Senate," and this scheme may well give some states more suffrage than others. In any event, having been here ten years, I believe that the constitutional system works remarkably well, even under present circumstances. I would not want to engage in any fancy scheme [such as the Council of Revision proposal] to fix a system that shows no signs of breakage.

Congressional Power to Limit Federal Court Jurisdiction

QUESTION: You commented earlier that you were not in complete agreement with the idea of Congress using its powers to curb federal court jurisdiction. Under what circumstances, then, may Congress restrict the jurisdiction, first, of the Supreme Court, and, second, of the lower federal courts?

HATCH: I think that restricting the jurisdiction of lower federal courts is a relatively easy thing to do for Congress. When it comes to the Supreme Court and the decision of basic fundamental rights and liberties, I think that is a more difficult thing to do. In that context, the Article III procedure restricting the jurisdiction of the Supreme Court may very well not apply.⁶⁰ In fact, I do not believe it does.⁶¹ Yet, I think

upon other institutions in the manner of an administrator with continuing oversight responsibilities.

That is what our courts have been doing, and that is how I define "judicial activism."

AMERICAN ENTERPRISE INSTITUTE, *supra* note 8, at 29.

60. See *The Constitution: That Delicate Balance*, (WNET, NY, television broadcast Nov. 13, 1984, transcript no. 109, at 8) (Hatch: "I think we have the power to limit the jurisdiction of the courts within certain parameters. If it comes to the constitutional rights that must be preserved, I'm not sure Congress can extend its power that far. It may try, and it may succeed, because the court itself as you know is not immune to political thought and theory.").

61. In the fall of 1985, Senator Hatch, commenting on proposed legislation to withdraw Supreme Court jurisdiction over public school prayer cases, said:

[T]he Senate has a judgment to make concerning the legal sufficiency of the Supreme Court's interpretations of the first amendment relative to prayer in public schools. . . . Although the Constitution vests in Congress some authority to make exceptions in the appellate jurisdiction of the U.S. Supreme Court, that limited power must be used very judiciously. This leads us to the crucial question presented by S. 47, specifically, whether Congress would be wise to do what it has some authority to do, namely withdraw Supreme Court jurisdiction over the subject matter of "voluntary prayer." . . . I have severe reservations about using in this instance the authority which the Constitution implies should be employed only in exceptional circumstances. . . . The better means to which I refer is . . . a constitutional amendment permitting silent prayer or meditation in public schools.

there is a wide body of law where it very well could apply.⁶²

[This leads to my next point.] Even though Congress may have the power [to limit the jurisdiction of the Supreme Court], it probably would be very unwise to exercise that power given the separation of powers doctrine. I think it should only be exercised under the most stringent of circumstances. For instance, I would have utilized it if I had been living at the time of the *Dred Scott*⁶³ decision to restrict [either the Court's jurisdiction over or the Court's enforcement of that decision].⁶⁴ That is why it has not been used, and I think most members of Congress realize the distinction [based on exceptional circumstances].

Some members of Congress do not believe that the Congress can restrict the jurisdiction of the Supreme Court, period. I think that is bunk. I think Congress can. But whether it should or not is the big question. Heroic constitutionalists, even though they may agree with the purpose for which, say, Senator Helms wants to restrict the jurisdiction of the Supreme Court, are going to stand up and say, "I'm sorry, but I can't do that because I think it's an unwise thing to do under the circumstances."

131 CONG. REC. 23,199 (1985).

62. For one summary of the Senator's constitutional and policy views on this subject, consider the following:

The language of article III itself seems to counsel Congress to use caution with regard to the Supreme Court's jurisdiction. . . .

[Section 2 of article III] already seems to imply some limitations in Congress' authority. Congress could not, for instance, withdraw all appellate jurisdiction of the Supreme Court because in that instance it would not be making an exception at all. Nor could Congress make a sweeping withdrawal of all jurisdiction to review cases dealing with the Bill of Rights. As the word "exception" implies, Congress' power relative to the entire corpus of the Court's appellate jurisdiction is limited to making rare and narrow diversions from the normal course of permitting the Court to hear appeals.

. . . Although Congress possesses a power, prudence often counsels against its use. . . . Congress has been appropriately reticent to wield its article III, section 2 power. That reticence should only be overridden when the dislocation associated with a focused restructuring of court remedies is far outweighed by the dislocations occasioned by an errant judicial policy. . . . This requires that we make clear delineations between legal issues and policy considerations. As a matter of law, the Constitution grants Congress some authority to regulate Federal court jurisdiction, but as a matter of policy, this public school prayer issue does not, in my view, warrant the exercise of this powerful check on the Court.

Id. at S23,199-200 (commenting on proposed legislation to withdraw Supreme Court jurisdiction over public school prayer cases).

63. *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

64. The bracketed phrases reflect our understanding of the Senator's meaning. In order to avoid any misinterpretation, however, we supply the actual wording of his response. Immediately after the word "circumstances," Senator Hatch added: "For instance, I would have utilized it if I had been living at the time of the *Dred Scott* decision to restrict the Court with regard to what it had propounded in *Dred Scott*. And there may have been a few other decisions, but darn few of them."

QUESTION: Senator, by way of clarification, would you adhere to the view that the rights and liberties that are fundamental, for which jurisdiction could *not* be curbed, would be those that are textually identified in the Bill of Rights? Would you limit it in that fashion?

HATCH: I do not know that you could limit it in that fashion, but there would come some ragged-edged decisions. During the first 200 years of our constitutional history, there have been very few instances in which the Article III authority to restrict has been utilized. I would like to see the next 200 years be about the same.

QUESTION: You have addressed your comments primarily to the U.S. Supreme Court. We understand you to believe that Congress both could and perhaps should have greater latitude with the lower courts, the federal district courts and the Courts of Appeals. Is that a fair statement?

HATCH: I think Congress can definitely restrict the jurisdiction of the lower courts. Whether it should or not is always a question.⁶⁵ The Norris-La Guardia Act⁶⁶ is a perfect illustration. The lower courts were administering injunctions all the time, and Congress just plain restricted the rights and powers to do that.

QUESTION: So, you would have a different standard for the district courts, even in fundamental rights cases, than you would for the U.S. Supreme Court?

HATCH: I think the Constitution has a different standard.⁶⁷ Anything we do on the Judiciary Committee that passes through the Congress generally places some restriction on the jurisdiction of the lower courts. You see very little restriction with regard to the Supreme Court, because the Congress has to recognize that the doctrine of separate but equal powers has to be maintained for this Constitution to work. Therefore, the Supreme Court has established its system of judicial review and it should be respected for it.

65. Senator Hatch himself has introduced measures to restrict the jurisdiction of inferior federal courts in several civil rights areas. *See, e.g.*, 127 CONG. REC. 3208 (1981) (S. 583, abortion); 129 CONG. REC. 802 (1983) (S. 139, public school busing); 131 CONG. REC. 101 (1985) (S. 37, public school busing).

66. 29 U.S.C. §§ 101-115 (1932), upheld in *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323 (1938).

67. At this point, Mr. Randall Rader commented: "Whenever you change a diversity amount you're actually changing the jurisdiction of a lower court."

"Plain Meaning" and the Public Accounts Clause

QUESTION: In light of the text of the Public Accounts Clause,⁶⁸ do you think that Congress is required to publish accounts of all appropriations, for example, those of the Central Intelligence Agency?

HATCH: No, I do not. The Constitution declares that a regular statement of "all public Money" should be published "from time to time." The Framers were well aware of the dangers of disclosing national security information, so they included Article I, Section Five,⁶⁹ which provides that Congress can refuse to publish such portions of the *Congressional Record* that do, in fact, require secrecy. Even such an ardent libertarian as Patrick Henry [conceded the need for secrecy].⁷⁰ The Supreme Court has consistently maintained that this particular provision is satisfied by Congress' general oversight of the budget in its decision to grant unspecified sums, for example, to the CIA.

QUESTION: Senator, we are not concerned with any issue of justiciability, but with constitutional decisionmaking by the Congress. By way of a follow-up question, do we understand you correctly to hold that, although the text [of Article I, Section Seven] admits of no national security exception, there is one implicit in the Constitution?

HATCH: I think there is. Once again, I suspect your question asks whether this provision—"all public Money"—ought to be construed according to its plain meaning. The plain meaning is really the whole answer. I think we really must seek the original meaning.⁷¹ I debated [the

68. U. S. CONST. art I, § 9, cl. 7 provides: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."

69. U. S. CONST. art I, § 5, cl. 3 provides: "Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy."

70. The Senator quoted Patrick Henry as saying: "Such transactions as relate to the military operations or the affairs of great consequence the immediate promulgation of which might defeat the interests of the community, I would not wish to be published."

71. Senator Hatch's understanding of interpretation by "original meaning" is more specifically developed in a speech delivered shortly before this interview:

This brings into focus the key question, namely what standards are to govern judges when they execute their responsibility of protecting all constitutional rights—to borrow from our first amendment example, the rights to speak on political subjects as well as the rights to maintain order in courtrooms or to protect national security.

I would posit that the only place that judges can look for a resolution of these dilemmas is the Constitution itself, not the subjective intent of a few of its authors (those authors sometimes disagree), not the subjective intent of its ratifiers (historical records are sometimes incomplete), and certainly not the subjective intent of contemporary judges. Indeed, a judge should not look to subjective intents at all, but at the

original intent issue] with Professor Laurence Tribe,⁷² and, in this case, it would be hard to conceive that the Framers really meant to require the disclosure of information that could jeopardize their own objective, namely, that the Congress or the Constitution must provide for the common defense. I think the provision speaks for itself, and I think it is implicit enough.

"Plain Meaning" and Executive Authority

QUESTION: Senator, do you believe that the President has the constitutional power under Article II to require federal governmental employees who work with classified documents to submit self-authored materials for prepublication review? In this regard, consider President Reagan's National Security Decision Directive 84.⁷³

HATCH: This prepublication review procedure is, for the most part, contractual. Federal employees who are likely to handle sensitive material sign a contract whereby they agree to abide by the review procedures. The courts have consistently upheld these contracts because of the fiduciary responsibilities these employees undertake with regard to national secrets. The executive branch, however, can only protect properly classified material through this type of procedure. The President's classification authority springs primarily from his Article II, Section One responsibilities as chief executive, and from his powers as commander-in-chief under Article II, Section Two. This entails taking steps necessary on occasion to provide for the common defense, including reasonable measures to protect our national security secrets.

QUESTION: Under Article II, then, would the President have the authority to compel federal government employees to submit to prepublication review regardless of whether there were contractual provisions to this effect?

original meaning of the words of the Constitution. On this point, the framers would agree.

This process entails ascertaining the general understanding of the words of the Constitution that prevailed in 1787 or 1868 or whenever the particular portion of the Constitution was adopted by a supermajoritarian process.

Opening Statement of Senator Orrin G. Hatch, *Atlantic Monthly Debate* (Dec. 11, 1986) (unpublished speech on file with authors; emphasis in original); see also O. HATCH, MYTHS, *supra* note 12, at 27.

72. The debate, entitled "The Debate on Original Intent in the Constitution," occurred on December 11, 1986, at the Kennedy School of Harvard University.

73. See S. KATZ, GOVERNMENT DECISIONS WITHOUT DEMOCRACY 31-34, 107 (1987). For a statement of Senator Hatch's perspectives on the related but more comprehensive issues of the respective powers of the Executive and the Congress in the creation and administration of foreign policy, see Cooper, Hatch, Rostow, & Tigar, *What The Constitution Means by Executive Power*, 43 U. MIAMI L. REV. 165, 197-204 (1988).

HATCH: Yes, he would have the authority.

QUESTION: Furthermore, do you believe that such executive directives are constitutional under the First Amendment, as you read it?

HATCH: As you realize, the First Amendment is not absolute. Perhaps the most famous exception is the "clear and present danger" test. Without knowing for sure whether any particular person's knowledge or the release of any particular document might create a clear and present danger to our national security, I still postulate that the directive would generally fit within that exception.

QUESTION: So you think [these prepublication directives] are constitutional?

HATCH: I think so.

QUESTION: The text of the First Amendment is singularly addressed to Congress. In your opinion, should it be interpreted to apply to the executive branch, as well? If so, why?

HATCH: I think it does apply. I mean, I do not know that I can answer that, but I think it does.⁷⁴

The Incorporation Doctrine

QUESTION: Mindful of considerations of text and historical intent, and regardless of decisional law, do you believe that the First Amendment should be applied to the states?

HATCH: The answer has to be yes. Since 1925, in the famous *Gitlow* case,⁷⁵ it has been established that the First Amendment has been incorporated into the Fourteenth Amendment's Due Process Clause. It would be late in the game today, as I view it, to reconsider that settled doctrine.

74. Concerning the question of how much interpretive deference should be given to the plain meaning of the constitutional text, consider the following statement by the Senator:

Article II, Section 1 states that a person must have "attained to the age of 35 years" in order to be eligible to be President. This sounds easy to interpret as a numerical cut-off. Yet a leading non-interpretivist scholar opined that this language should be viewed as a vague recognition of the importance of maturity and could be replaced by "fifty years or thirty years without impairing the integrity of the constitutional structure." In other words, 35 does not mean 35, but some undefined notion of maturity. Can you imagine the Supreme Court deciding whether an individual elected President by the People of the United States is sufficiently mature to serve?

In another sense, this is an intellectually honest opinion by this non-interpretivist because it demonstrates that if courts are free to stray from the original meaning of the Bill of Rights and other Amendments to protect minority rights, they are also free to depart from the purpose and meaning of the structural provisions of the Constitution. In either case, I would suggest that a court would be improperly deviating from our fundamental law.

Opening Statement, *supra* note 71, at 4 (citing Tushnet, *A Note on the Revival of Textualism in Constitutional Theory*, 58 S. CAL. L. REV. 683, 687 (1985)).

75. *Gitlow v. New York*, 268 U.S. 652 (1925).

To my knowledge, not a single member of the present Supreme Court would question the doctrine of incorporation, including its application to the First Amendment.

Now, in terms of history, John Marshall did state in *Barron v. Baltimore*⁷⁶ that the Bill of Rights applied only to the federal government. The 39th Congress, however, enacted the Fourteenth Amendment, and the states ratified that amendment. I am aware of the argument that the text of the Due Process Clause only requires procedural fairness, and that the First Amendment is substantive in its application or in its protections. Nonetheless, the larger context of the Fourteenth Amendment and subsequent Supreme Court interpretations suggest that first amendment liberties are so fundamental that they would have to be protected against any deprivation regardless of [the Fourteenth Amendment's] procedural character. That is a fair statement of where we are.

QUESTION: Senator, what are your views about the Second Amendment and its applicability to the states?

HATCH: As you know, the incorporation doctrine is selective. Not all of the guarantees in the Bill of Rights have been held implicit in the "concept of ordered liberty" and thus incorporated into the Due Process Clause. The Second Amendment has not been incorporated.

QUESTION: Do you agree with that position?

HATCH: There is an explanation for this. The Second Amendment has not been considered [to embody] an individual right to bear arms, but a collective right to the security supplied by the state militia. Under this view of the Second Amendment, it is understandable that the Court would not place it alongside the First Amendment and the other individual rights that have been considered fundamental. Moreover, the Court has had few, if any, opportunities to consider a second amendment case, because the militia argument [has prevailed] in the lower courts. If, as I have suggested, the Second Amendment is read to protect a reasonable individual's right to bear arms—if it is read that broadly, and it could very well be—then that right would probably warrant incorporation.

QUESTION: Which of these readings do you endorse?

HATCH: Basically, I believe that there should be a fundamental individual right to bear arms.

QUESTION: So you would see the broader construction of the Second Amendment as the preferable one?

HATCH: Yes, I would. Sure.

QUESTION: Regardless of what the federal courts have said?

76. 32 U.S. (7 Pet.) 243 (1833).

HATCH: Yes. However, I am not sure that, if I were on the Court, I would do that.⁷⁷ I am just saying that, personally, I believe that the Second Amendment's [protection extends beyond] the militia argument. I have written on that subject.⁷⁸

QUESTION: Do you personally believe, as well, that the First Amendment should be incorporated?

HATCH: At this point, yes.

QUESTION: In light of what you have said, what about the Fifth Amendment's self-incrimination and double jeopardy provisions? In your view, should they be applicable to the states?

HATCH: Yes. In adopting the Due Process Clause, the nation clearly intended that states would be forbidden to deprive persons of liberty without due process. These are precisely those kinds of protections. It seems to me that we are to be protected against any form of state deprivation. So, I think [that these fifth amendment guarantees] should apply to the states.

Closing Comments

QUESTION: Senator, is there anything you would like to add by way of summary or supplementary comment considering the issues we have discussed? Perhaps, in retrospect, you might like to add something? Or tell us what you believe to be particularly troublesome in American constitutional law today?

HATCH: Well, I think some of the more difficult decisions that the Supreme Court is going to have to rule upon in the future are going to involve the high deficits and budget problems of the United States. And I believe it is going to take some very, very erudite thinking to resolve

77. Speaking on the floor of the Senate in 1983, Senator Hatch addressed the second amendment issue:

In my studies as an attorney and as a U.S. Senator, I have constantly been amazed by the indifference or even hostility shown to the Second Amendment by courts, legislatures, and commentators. James Madison would be startled to hear that his recognition of a right to keep and bear arms . . . has since been construed in but a single, and most ambiguous, Supreme Court decision . . . [I]n all too many instances, courts or commentators have sought, for reasons only tangentially related to constitutional history, to construe this right out of existence. . . . [T]he Framers used the term "Militia" to relate to every citizen capable of bearing arms. . . . I have long regarded the right of Americans to keep and bear arms as one of the most vital rights recognized in the Bill of Rights.

129 CONG. REC. S3675-76 (daily ed. Mar. 23, 1983) (remarks in support of a measure restructuring federal firearms laws, co-sponsored by Senator Hatch).

78. See *The Constitution: That Delicate Balance*, *supra* note 60, at 12 (Hatch: "I do not believe that either the state or the federal government has—should have the right to take away people's right to bear arms."); see also *supra* notes 27 & 77.

those problems.⁷⁹ The courts must recognize that Congress has some responsibility, too. Maybe, the courts are going to have to be [just as] cognizant of Congress' co-equal power as Congress is of the courts'. It seems to me that the Framers never contemplated that we would have continually unbalanced budgets. One day, that is going to be one of the biggest issues that has ever come before the Supreme Court.

QUESTION: Do you think the Court is institutionally competent to adjudicate a balanced-budget amendment?

HATCH: The Court is not competent to adjudicate a number of issues, but it always seems to do it.⁸⁰

COLLINS/SKOVER: Thank you, Senator.

79. As early as 1979, Senator Hatch became a leading force for the promotion of a constitutional amendment requiring a balanced budget. *See* 125 CONG. REC. 13,864-66 (1979) (introducing S.J. Res. 86). In 1982, he cosponsored another such amendment, S.J. Res. 58, "the first proposed amendment on this subject to be reported out of the Senate Judiciary Committee . . ." 128 CONG. REC. 15,812 (1982) (text of amendment and commentary at 15,812-31); *see also* 132 CONG. REC. S2222 (daily ed. Mar. 6, 1986) (cosponsoring S.J. Res. 225, another balanced-budget amendment); *id.* at S2153-68 (statement in support of S.J. Res. 225).

80. Senator Hatch discussed the role of the federal courts in enforcing the provisions of a proposed balanced budget amendment (S.J. Res. 58):

While my own confidence in the idea of judicial self-restraint has been sharply diminished in recent years, I believe nevertheless that traditional judicial and constitutional conceptions of justiciability, and standing, as well as the idea of what constitutes a "political question" are best reserved to non-judicial branches of the Government, suffice to insure that the courts will not involve themselves, as a normal matter, in reviewing the operations of the budget process. . . .

. . . [W]hile the committee has chosen not to prohibit judicial review altogether of "cases or controversies" arising in the context of the proposed amendment—in the belief that the most serious and unambiguous violations of its provisions ought to be subject to external check . . . it nevertheless is expected that the amendment will be largely self-enforcing and self-monitoring.

128 CONG. REC. 15,812, 15,828, 15,829 (1982).

